Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Stale or Moot Docketed Proceedings	)	
	)	
1993 Annual Access Tariff Filings	)	CC Docket No. 93-193
Phase I	)	
	)	
1994 Annual Access Tariff Filings	)	CC Docket No. 94-65
	)	
AT&T Communications Tariff F.C.C. Nos. 1	)	CC Docket No. 93-193
and 2, Transmittal Nos. 5460, 5461, 5462,	)	
and 5464	)	
Phase II	)	
	)	
Bell Atlantic Telephone Companies Tariff	)	CC Docket No. 94-157
F.C.C. No. 1, Transmittal No. 690	)	
	)	
NYNEX Telephone Companies Tariff	)	
F.C.C No. 1, Transmittal No. 328	)	

PETITION FOR RECONSIDERATION

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March 27, 2003

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To: The Wireline Competition Bureau

PETITION FOR RECONSIDERATION

In an Order, Notice, and Erratum adopted and released on February 25, 2003 ("*Reinstatement Order*"), the Chief, Wireline Competition Bureau, purported to "correct" and nullify part of a Commission order, released more than a year earlier, that had terminated as "stale or moot" a group of docketed proceedings including CC Docket No. 94-157. Order, 17 FCC Rcd 1199 (2002) ("*Termination Order*"). In the *Reinstatement Order*, the Bureau concluded that the Commission's termination of CC Docket No. 94-157 was "an inadvertent technical error" and that "the Commission never intended to terminate" the investigation in that docket. *Reinstatement Order* ¶ 21. On the basis of that conclusion, and without citing any supporting Commission precedents for such

action, the Bureau "reinstate[d] the investigation in CC Docket No. 94-157" and ordered Verizon to file a new direct case in the docket within 45 days. *Reinstatement Order* ¶¶ 22, 27.

Neither the Bureau nor the Commission has authority to "correct," long after the time for reconsideration and judicial review has expired, a final order that affects the substantive rights of a party. Accordingly, pursuant to § 405(a) of the Communications Act of 1934, 47 U.S.C. § 405(a), and 47 C.F.R. § 1.106, the Verizon telephone companies ("Verizon") (as successors of the Bell Atlantic telephone companies and the NYNEX telephone companies), respectfully submit this petition for reconsideration of the *Reinstatement Order*. For the reasons set forth below, the Bureau should set aside its order and affirm that CC Docket No. 94-157 has been terminated.

BACKGROUND

The procedural history is described in detail in the *Reinstatement Order* and will not be repeated here. What follows is a brief summary of the essential facts needed to frame the legal question for reconsideration.

The proceeding at issue (CC Docket No. 94-157) began in December 1994, when the Bureau (formerly the Common Carrier Bureau) suspended for one-day tariff revisions filed by Verizon's predecessor companies, initiated an investigation, and imposed an

accounting order.[1] The tariff revisions sought, among other things, exogenous treatment of certain OPEB-related costs for the period of January 1, 1991, through June 30, 1995.[2]

During August and September 1995, in accordance with the Bureau's order designating issues for investigation,[3] Verizon's predecessors submitted their direct case. A single party (MCI Telecommunications Corp.) thereafter filed an opposition, and Verizon's predecessors filed a reply brief. There followed a lengthy period of inactivity in the proceeding. After more than six years had elapsed with no substantive filing in the docket, the Commission, on January 11, 2002, released its *Termination Order*, which terminated CC Docket No. 94-157, along with a nine-page list of other "stale or moot" proceedings.

With respect to CC Docket No. 94-157, no party sought reconsideration of the *Termination Order* within the 30-day period prescribed by 47 U.S.C. § 405(a), and no party sought judicial review within the 60-day period prescribed by 28 U.S.C. § 2344. Nor did the Commission take action on its own motion, within the 30-day period established by 47 C.F.R. § 1.108, to set aside its termination of CC Docket No. 94-157. In contrast, the Commission *did* take action prior to the expiration of these periods with

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[1] *See Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690, NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328, Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1738 and US West Communications, Transmittal No. 550*, CC Docket No. 94-157, Memorandum Opinion and Order, 10 FCC Rcd 1594 (Com. Car. Bur. 1994).

[2] *Id.*, 10 FCC Rcd at 1597, ¶ 25.

[3] *See 1993 Annual Access Tariff Filings,* CC Docket No. 93-193, *1994 Annual Access Tariff Filings*, CC Docket No. 94-65, *AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464*, CC Docket No. 93-193, *Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690*, CC Docket No. 94-157, Order Designating Issues for Investigation, 10 FCC Rcd 11804 (Com. Car. Bur. 1995).

respect to other dockets listed in the *Termination Order*. In an order adopted on March 8, 2002, and released on March 12, 2002, within the 60-day period allowed for judicial review, the Common Carrier Bureau "reinstate[d] two proceedings that were terminated in error." *Termination of Stale or Moot Docketed Proceedings,* Erratum, 17 FCC Rcd 4543 (Com. Car. Bur. 2002).

Accordingly, after the period for judicial review expired on March 12, 2002, the termination of CC Docket No. 94-157, and of the associated accounting order imposed in December 1994, became final and non-reviewable in all respects.

Long after the Commission's release of the *Termination Order*, AT&T (which had not filed an opposition to Verizon's predecessors' direct case in CC Docket No. 94-157) for the first time urged the Wireline Competition Bureau, in the course of an *ex parte* meeting on October 22, 2002, to disallow exogenous treatment of the OPEB costs that were originally at issue in that terminated docket.[4] AT&T's written summary of the meeting cited no authority for the Commission to take further action in a proceeding that had long ago been finally terminated; indeed, it did not even mention the termination. Instead, acting as if it had actively opposed the direct case of Verizon's predecessors and as if the proceeding had never been terminated, AT&T simply advanced its own substantive view that exogenous treatment of the OPEB costs in the 1994 tariff revisions was unjustified.

In response to AT&T's *ex parte* argument, and without prior notice or hearing, the Bureau reinstated CC Docket No. 94-157 on the ground that its termination was an

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[4] *See* Letter from Patrick H. Merrick, Director, AT&T Federal Government Affairs, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 93-198 (filed October 23, 2002).

unintentional and inadvertent "technical error." *Reinstatement Order* ¶ 21. The only legal authority cited by the Bureau as a basis for reinstatement was § 4(i) of the Communications Act, 47 U.S.C. § 154(i), and its unexplained reference to that section appeared only in the relevant ordering paragraph. *See id.* ¶ 35.

ARGUMENT

THE BUREAU EXCEEDED THE COMMISSION'S POWER TO RECONSIDER OR CORRECT ITS OWN ERRORS

Neither the Bureau nor the Commission has authority to "reinstate" a previously terminated tariff investigation where the time for agency reconsideration and judicial review of the termination order has long ago expired and where the reinstatement affects the substantive rights of a party. Because the Commission terminated CC Docket No. 94-157 in a final order released more than a year before the Bureau attempted to reinstate it, and because both the termination and the reinstatement directly affect Verizon's substantive rights, the *Reinstatement Order* must be set aside.

A. The *Reinstatement Order* Was Adopted Long After the Time for Reconsideration and Judicial Review Had Expired and Is Incompatible with §§ 204 and 205 of the Act

1. The courts have long held that "[t]he power to reconsider is inherent in the power to decide" and therefore that the Commission, like other agencies, has power to rectify its own mistakes, within appropriate limits. *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950); *see also American Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984); *Spanish Int'l Broad. Co. v. FCC*, 385 F.2d 615, 621 (D.C. Cir. 1967). But it is equally clear that the power may be exercised only within the period allowed for agency reconsideration or judicial review and only within the bounds of the Commission's statutory authority. As the D.C. Circuit stated in *Albertson*, the Commission may, "in the

absence of any specific [statutory] limitation," correct its own mistake if it acts "within the period for taking an appeal." 182 F.2d at 399. "That is so," the court explained, "for within such period jurisdiction over the contested order remains with the Commission." *Id.*; *see also American Methyl Corp.*, 749 F.2d at 835 ("agencies have an inherent power to correct their mistakes by reconsidering their decisions *within the period available for taking an appeal*") (emphasis added). That the Commission itself, within the time allowed for judicial review, reinstated two *other* proceedings that had been terminated in error in the *Termination Order* demonstrates both the appropriateness of the *Albertson* rule and the Commission's capacity to fulfill its responsibilities in a manner consistent with that rule.

Here, of course, the time for reconsideration or judicial review of the *Termination Order* expired on March 12, 2002, and the Bureau did not adopt its *Reinstatement Order* until nearly a year later, on February 25, 2003. For that reason alone, the *Reinstatement Order* falls outside the range of permissible correction orders.

2. In addition, insofar as the *Reinstatement Order* purports to revive an investigation under § 204, it cannot be squared with that section's pre-conditions for an investigation leading to the possibility of a refund order. When a carrier files tariff revisions, the Commission is empowered by § 204 to suspend the revisions for up to five months, start an investigation, and impose an accounting order. If, at the conclusion of its investigation, it finds that a charge is unlawful, it may order the carrier to refund any amounts found to be unjustified. The Commission's power to order a refund under § 204 depends on its following the procedures set forth in that section. *See Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992).

Although the Commission followed the appropriate procedures when it began the investigation in CC Docket No. 94-157 in December 1994, that proceeding ended on January 12, 2002, without a finding that the charges at issue were unlawful and without a refund order. Once the *Termination Order* became final and non-appealable, the effect of the initial suspension order died along with the investigation and the associated accounting order. That does not mean that the Commission is without power to address a claim that the tariff at issue is unlawful. The Commission is free at any time to start a proceeding under § 205. If, after an appropriate hearing, the Commission finds the tariff charges unlawful, it may prescribe the new lawful charges "to be thereafter observed." 47 U.S.C. § 205(a). Because § 205 "speaks only prospectively," however, the Commission may not order a refund under that provision. *Illinois Bell*, 966 F.2d at 1481. Moreover, the Commission has already implemented rule changes that eliminate any prospective exogenous recovery for OPEB accounting changes. *See Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd 8961, ¶ 309 (1995). Indeed, the Commission has reformed its price cap rules several times since beginning the OPEB investigation. These changes only highlight the unreasonableness of the Bureau's effort to resurrect this stale issue.

The Commission may not circumvent this statutory design by attempting to breathe new life into a § 204 investigation that died long ago. In *American Methyl Corp.*, the court rejected the EPA's analogous claim of inherent power to revoke a mistakenly granted fuel waiver because Congress contemplated separate proceedings under a different statutory section to rectify any such waiver mistakes. *See* 749 F.2d at 834-37. Likewise, Congress gave the Commission in § 205 a specific tool that it may use to

correct prospectively an error it may have made in terminating a § 204 investigation. The existence of that alternative statutory mechanism undermines the Bureau's assertion of power to "reinstate" a previously terminated § 204 proceeding more than a year later. As in *American Methyl Corp.*, "when Congress has provided a mechanism capable of rectifying mistaken actions, . . . it is not reasonable to infer authority to reconsider agency action. . . . Thus, while Congress may have wanted the [Commission] to correct [its] mistakes, it provided a mechanism sufficient to this task in [§ 205]." *Id.* at 835-36.

B. Any Power the Commission May Have To Correct Clerical Errors Does Not Apply Where, as Here, the Supposed Error Plainly Affects a Party's Substantive Rights

Because § 204 clearly bars the Bureau's attempt to reincarnate CC Docket No. 94-157 at this time, the Bureau cannot look to general principles that might permit an agency to correct non-substantive errors in limited circumstances. But those principles would not, in any event, support the Bureau's reinstatement of the terminated tariff investigation. In contexts other than a rate investigation, whose validity depends on a timely (and still effective) suspension and accounting order, the courts have on occasion permitted agencies to correct a purely clerical or ministerial mistake — misspelling a party's name, using the wrong date on an order, or the like. But even that limited power does *not* extend to mistakes that affect a party's substantive rights.

The courts have looked to the Federal Rules of Civil Procedure for an analytical model. Rule 60(a) allows a district court to correct a "clerical mistake" "at any time." In contrast, Rule 60(b)(1) allows a district court, on a motion filed "not more than one year after" the entry of a judgment or order, to relieve a party from the judgment or order because of "mistake, inadvertence, surprise, or excusable neglect." Rule 60 thus distinguishes between "clerical mistakes" on the one hand and substantively mistaken

orders on the other. In *American Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133 (1958), the Supreme Court relied in part on an analogy to Rule 60(a) in upholding an ICC order adding to a motor carrier's certificates of public convenience and necessity a reservation of agency power that the Commission, because of "clerical inadvertence," had mistakenly failed to include in the formal certificates despite a clear statement in its earlier order imposing the reservation. The D.C. Circuit, using the same analogy to Rule 60, has likewise upheld an agency's power to correct similar transcription errors. *See Howard Sober, Inc. v. ICC*, 628 F.2d 36, 41-42 (D.C. Cir. 1980).

Here, however, the circumstances do not resemble the kind of clerical errors at issue in *Frisco* and *Sober*. As the judicial precedents make clear, relief under Rule 60(a)'s "clerical mistake" authority is limited to "errors of transcription, copying, or calculation," and does not apply to an error that "affects the substantive rights of the parties." *Olie v. Henry & Wright Corp.*, 910 F.2d 357, 363-64 (6th Cir. 1990) (internal quotation marks omitted); *accord In re American Precision Vibrator Co.*, 863 F.2d 428, 430 (5th Cir. 1989) (the term "clerical mistake" "does not encompass errors that involve judgment or discretion, especially when altering the error affects the substance of the judgment"); *Jones v. Anderson-Tully Co.*, 722 F.2d 211, 212-13 (5th Cir. 1984); *Bershad v. McDonough*, 469 F.2d 1333, 1336 (7th Cir. 1972). Thus, where a court's legal description of a property boundary in a prior action had unintentionally given one party 18 acres of another party's land, the court could not five years later correct the mistake under Rule 60(a) because it did not qualify as a "clerical mistake" but rather "affects the substantive rights of the parties." *Jones v. Anderson-Tully Co.*, 722 F.2d at 212. If an error was made, the court explained, "it is one of mistake, inadvertence, surprise, or

excusable neglect governed by Rule 60(b)(1)"; but because more than a year had elapsed, correction was "barred by the Rule 60(b) one-year statute of limitations." *Id.* at 212-13.

The Commission's termination of CC Docket No. 94-157 was not some typographical hiccup of the sort remediable under Rule 60(a). Rather, as the order itself reflects, the Commission "reviewed the docket proceedings listed in the Appendix, and . . . determined that the dockets should be terminated." *Termination Order*, 17 FCC Rcd at 1199, ¶ 1. That language plainly conveys intentional action by the Commission, not a slip of the pen. Though the Bureau may now believe that the Commission's intention at the time was the product of neglect, confusion, or simple mistake of fact, that kind of error would not be remediable by analogy to Rule 60(a) even in a non-rate case. *See, e.g.*, *In re Craddock*, 149 F.3d 1249, 1254 n.4 (10th Cir. 1998) ("Rule 60(a) may be used to correct what is erroneous because the thing spoken, written or recorded is not what the person intended to speak, write or record"; it "is not available to correct something that was deliberately done but later discovered to be wrong"). Using the label "inadvertent technical error" (*Reinstatement Order* ¶ 21) does not change its character and cannot bring it within the scope of the purely mechanical transcription errors envisioned by Rule 60(a).

Rather, if there was an error at all, it resembles those that a district court may correct, if at all, only under the authority to address errors of "inadvertence" in Rule 60(b)(1), which imposes a strict time limit designed to promote "the value of finality and repose" and to "provide the parties with certainty." *In re Frigitemp Corp.*, 781 F.2d 324, 327 (2d Cir. 1986); *accord In re American Precision Vibrator Co.*, 863 F.2d at 430. The analog to Rule 60(b)(1) here is the *Albertson* rule, which allows the Commission to

correct its own mistakes "within the period for taking an appeal." 182 F.2d at 399. Just as the time limit of Rule 60(b)(1) is grounded in considerations of finality and repose, so too does the *Albertson* principle have the salutary effect of permitting parties to operate their businesses with confidence that, once an order has become final and non-appealable, it may be relied upon without fear that months or years later the agency may change its mind, for whatever reason.

Considerations of finality and repose are of special significance here. Many of the same policies that justify statutes of limitations apply with added force when an agency has terminated an old tariff investigation and fails to reinstate it within the normal period for reconsideration or appeal. Once the time for further review has expired, the affected company needs no longer worry about preserving the evidence it might otherwise have needed to make its case. Particularly in the absence of some rule or notice alerting the party that the investigation may yet be revived at some indeterminate point in the future, pertinent documents may be destroyed or lost, relevant personnel may leave the company, and memories may no longer be sufficient to recall the key facts. Indeed, the circumstances of this case exacerbate those concerns. The tariff revisions at issue were filed, and the investigation was begun, more than eight years ago. The proceeding was dead in the water for many years before the Commission finally brought it to a formal end. To exhume the case at this point would be deeply prejudicial.

In the *Reinstatement Order*, for example, the Bureau has ordered Verizon to file a new direct case, including studies, demonstrating that OPEB costs incurred prior to January 1, 1993, are eligible for exogenous cost treatment. Though Verizon may be able to re-file its original direct case and studies, which are already in the record, its ability to

provide new studies or information at this point — or even to defend against challenges to the old filing — is severely constrained. It would be egregiously unfair to reimpose such a requirement anew, more than seven years after the proceeding began and more than a year after it ended. Indeed, many of the personnel that helped prepare those filings have left the company or moved on to other responsibilities, and Verizon's ability to meet its burden of proof in a rate proceeding has been severely hampered.

The *Reinstatement Order* is also blatantly out of harmony with the text of § 204 itself. Recognizing the deleterious effects of long-delayed tariff investigations, Congress has taken increasingly aggressive steps to require the expeditious handling and termination of such investigations. In 1988, it added subsection (2), directing the Commission to conclude a § 204 investigation within 12 months after the tariff takes effect (or 15 months in a case of "extraordinary complexity"). Dissatisfied with the Commission's performance under that provision, Congress amended the section in the Telecommunications Act of 1996. The section now provides that "the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective." 47 U.S.C. § 204(a)(2)(A). It would be hard enough to justify, in light of that provision, the perpetuation at this late date of a tariff investigation that began in December 1994. But to conclude that investigation several years after even the pre-1996 Act deadline passed, and then to resurrect it and start a new proceeding more than a year after it was concluded, treats the statutory deadlines as if they were meaningless.

C. Section 4 of the Act Does Not Authorize Reinstatement in These Circumstances

Although the Bureau's *Reinstatement Order* included in the ordering paragraphs a boilerplate invocation of § 4(i), that section does not give the Commission authority to reinstate CC Docket No. 94-157. It has long been settled that § 4(i) confers no independent substantive authority but rather provides only ancillary authority to implement substantive authority expressly granted elsewhere in the Act. For example, in *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002), the court quoted and expressly agreed with a dissenting statement by Chairman Powell in which he aptly described the limitations of 4(i):

> It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a "necessary and proper" clause. Section 4(i)'s authority must be "reasonably ancillary" to other express provisions. And, by its express terms, our exercise of that authority cannot be "inconsistent" with other provisions of the Act. The reason for these limitations is plain: Were an agency afforded carte blanche under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.

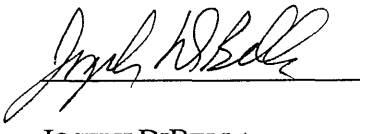
As the court noted, "Chairman Powell's discussion of this provision says it all." *Id.*

Here, as we have shown, reinstatement is inconsistent both with §§ 204-205 and with the statutory time limits for reconsideration and judicial review. And because no provision of the Act expressly empowers the Commission to correct errors of substantive judgment long after an order has become final and non-reviewable, § 4(i) is not a sufficient basis for the Bureau's action.

CONCLUSION

The Bureau should set aside the *Reinstatement Order*.

Respectfully submitted,



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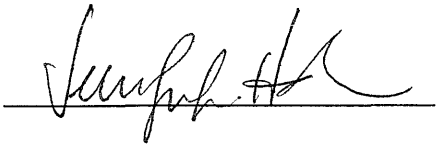
March 27, 2003

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of March, 2003, copies of the foregoing "Petition for Reconsideration" were sent by first class mail, postage prepaid, to the parties listed below.



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